No. 10458

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

PORTLAND TRUST AND SAVINGS BANK, a Corporation, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR THE APPELLEE

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JURISDICTION

The appellee concedes and agrees to all that appellant has set forth in its brief under the heading of jurisdiction.

STATEMENT

The action was brought by William V. Mahoney, incompetent, by his guardian, Portland Trust and Savings Bank, a corporation, to recover total permanent disability benefits due him under a contract of war risk term insurance issued during his military service. This policy was issued December 7, 1919; the veteran paid premiums on it to August 1, 1920; by reason of the grace period protection under the policy expired August 31, 1920. The claim for benefits under the policy was filed by the guardian July 28, 1941. This claim was denied November 3, 1941 (R. 9-10) and the action was filed November 19, 1941 (R. 2).

In this case a pretrial was had and a pretrial order was entered December 10, 1942 (R. 9). In the pretrial proceedings appellant denied that the insured became permanently and totally disabled on May 22, 1920 or at any time during the period of insurance protection under said policy and further denied that the insured was insane and mentally incompetent on May 22. 1920, and further denied that the insured had been continuously since said date, insane or incompetent (R. 10-11).

As a result of the pretrial the case was tried upon the issues of whether the insured was insane on or prior to July 3, 1931 and whether the insured became permanently and totally disabled on or prior to August 31, 1920 (R. 11). It was the contention of the Government that if the insured was not insane on or

prior to July 3, 1931 the Court would not have jurisdiction to hear and determine this action (R. 11).

At the request of Government counsel, special interrogatories were submitted to the jury and the jury trial on these issues resulted in affirmative answers by the jury to the two special interrogatories (R. 14-15), and also resulted in a general verdict for the plaintiff (R. 15).

QUESTIONS PRESENTED

1. Whether this appeal should be dismissed by reason of appellant's failure to include in the record on appeal all of the evidence produced at the trial of this action.

2. Whether there was substantial evidence showing that William V. Mahoney was an "insane person" within the meaning of Section 19 of the World War Veterans Act (38 U.S.C. 445), on July 3, 1931.

3. Whether there was substantial evidence showing that William V. Mahoney was totally and permanently disabled on or prior to August 31, 1920.

PERTINENT STATUTES AND REGULATIONS

The appellee concedes and agrees that appellant has properly set forth the pertinent statutes and regulations in its brief.

ARGUMENT

I.

This appeal should be dismissed by reason of appellant's failure to include in the record on appeal all of the evidence produced at the trial of this action.

A judgment was entered in favor of the appellee in this case on December 12, 1942 (R. 17). The Government on December 19, 1942 filed a motion to set aside verdict and judgment, or in the alternative for a new trial (R. 19). This motion was denied on February 1, 1942 (R. 23). The appellant filed its notice of appeal on April 23, 1943 (R. 23) and at the same time filed its statement of points upon which appellant intended to rely on appeal (R. 24), together with its designation of contents of record on appeal (R. 26). Three days later the appellee filed its designation of additional matters to be included in the record on appeal (R. 28). On May 17, 1943, appellant secured an extension of time for filing its record on appeal to and including June 12, 1943 (R. 421). This record on appeal was filed with this Court on June 11, 1943 (R. 423). On June 12, 1943, the appellant filed its designation of the parts of the record to be printed (R. 428). The appellee filed its designation of additional parts to be printed June 11, 1943 (R. 429). June 23, 1943 appellant filed its designation of additional parts of the record to be printed (R. 431). At this point, in accordance with the Rules of Civil Procedure and the rules of this Court, the record was ready to be printed.

On July 7, 1943, the attorneys for appellee received from the appellant a document purporting to be an amendment to the designation of the parts of the record to be printed, although said document was not certified as being a true copy (R. 432-436). On July 7, 1943 Paul P. O'Brien, Clerk of this Court, forwarded to appellee's attorneys a copy of a letter addressed to Francis J. McGan, one of the attorneys for the appellant. Mr. O'Brien's letter referred to the amendment of appellant's designation of the parts of the record to be printed. The intent and effect of this amendment was to cut out and eliminate a considerable part of the record. By this amendment the estimated cost of printing was reduced from $725.00 to $550.00 and thereby twenty-four per cent. of the record made in the trial court was removed from the consideration of this Court.

On July 15, 1943 attorneys for appellee received a letter from the said Francis J. McGan requesting that appellee join in a stipulation agreeing that the record be printed in this case with evidence left out as provided in said amendment. On July 20, 1943 the attorneys for appellee addressed an airmail letter to said Government counsel therein refusing to enter into the proposed stipulation and informing said Government counsel that if the record was printed with the proposed omissions, the appellee would urge a motion for dismissal of the appeal. An open copy of this letter was forwarded to the Honorable Paul P. O'Brien, Clerk of this Court.

It is a well recognized principle of law that where the ground for appeal is, as in this case, the question of whether or not there was substantial evidence to go to the jury, the Appellate Court must have presented to it, all of the evidence that was presented in the trial court, upon which the trial judge passed when it denied a motion for a directed verdict.

Supplement to O'Brien's Manual of Appellate Procedure, 3rd Edition, Page 17:

> "Appellate Court will assume that evidence not in the record justified trial court's findings based on the evidence."

Cole v. Home Owners Loan Corporation, 128 F. (2d) 803, 805 (C.C.A. 9th):

> "The evidence, not having been brought before us, must be presumed sufficient to support this finding. Dombrowski v. Beu, 9th Circuit, 144 F. (2d) 91."

Kentucky Natural Gas Corp. v. Indiana Gas & Chemical Corp., 129 F. (2d) 17, 21 (C.C.A. 7th) held:

> "Defendant insists that the Court erred in adjudging the contract terminated as of December 31, 1940. But again we must assume that the evidence upon which the court based its conclusion in this respect, which is not in the record, justified the finding."

Sublette et al. v. Servel, Inc., 124 F. (2d) 516, 517 (C.C.A. 8th):

> "It is, of course, obvious that the question presented for review cannot be considered or determined by this court upon the defective record furnished by

> the appellant. The findings of the trial court are presumptively correct. In the absence of a proper record, shown to contain all of the evidence essential to enable this court to determine the correctness or incorrectness of the challenged findings, such findings cannot be questioned on review (citing cases)."

In Drybrough v. Ware, 111 F. (2d) 548, 550 (C.C.A. 6th), the court held that it devolves upon the appellant to see that the record is brought to the Appellate Court with such of the proceedings of the trial court as may be necessary for the proper presentation of the points upon which the appellant intends to rely and for lack of such record, the Appellate Court has the power to dismiss the appeal. This power should be exercised when an omission arose from negligence or indifference of appellant. In this case the appellant had filed only a part of the record and there was no showing what evidence, if any, the trial court heard in passing upon the points raised by the appellant.

It should be noted that there is no provision whatsoever, either in the Rules of Civil Procedure or in the rules of this Court which gives an appellant the right or the privilege to file an amended designation of the part of the record to be printed. Rule 19 (6) of this Court provides that the appellant shall, upon the filing of the record in this Court, file with the Clerk a concise statement of the points on which he intends to rely and designate the parts of the record which he thinks necessary for the consideration thereof, there being no provision for amendment of such designation. In this case the original designation of appellant was

filed on June 12, 1943 and twenty-five days later the appellant filed the said amendment. If such a procedure were adopted, it would make it possible to postpone almost indefinitely the hearing of an appeal and thus inflict a hardship on parties who desire to have the appeal heard promptly. In this particular case, it worked an additional hardship in that it prevented the hearing of the arguments at the term of Court held in Portland, Oregon, in September, 1943.

The authorities cited, show that the Appellate Court should have all the evidence heard by the trial court before it when asked to pass on the question of alleged lack of substantial evidence. To see that a considerable part of the evidence was omitted by appellant's action in amending its designation, one has but to read the amended designation (R. 432-434).

In summing up argument upon this first point, it is obvious that this record is defective in that all the evidence is not included. It is further obvious that there is no provision for filing such an amended designation of the parts of the record to be printed. It is clear that appellant acted with knowledge that the appellee would ask this court to dismiss the appeal if the appellant continued to insist on leaving out substantial parts of the evidence and, in face of this, the appellant elected to leave out evidence. Therefore, appellee respectfully moves for an order dismissing the appeal upon these grounds.

II.

There was substantial evidence showing that William V. Mahoney was an "insane person" within the meaning of Section 19 of the World War Veterans Act, (38 U.S.C., 445), on and prior to July 3, 1931.

The appellant in its brief, in the footnote on page three, does not urge, but states that it might reasonably be doubted that insanity on this date would bring the case within the statutory exception. In this same footnote appellant further states that the evidence with respect to July 3, 1930 is substantially the same as that relating to July 3, 1931 and thus accepts the issue as made in the District Court. In two war risk insurance cases, United States v. Todd, 70 F. (2d) 540, and United States v. Anderson, 70 F. (2d) 537, this court stated that appellate courts look with disfavor upon questions raised for the first time in such courts for the reason that the trial court is entitled to have the entire matter presented to it and to be given an opportunity to rule thereon and not be reversed for errors of which it is not aware. In this case, it was clearly determined at the pretrial proceeding (R. 11) that if the veteran was insane on July 3, 1931, the court had jurisdiction to hear and determine this action. This was the understanding by both counsel and by the court. Moreover, Rule 15 (b) of the Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they

had been raised in the pleadings. In this case evidence was produced showing the insanity of the veteran at the time of his discharge from the army. Furthermore, there was in addition to the special interrogatories, a general verdict by the jury, the first part of which found generally in favor of the plaintiff and against the defendant. So even if this court were to find that it was necessary to prove that the insured was insane on or prior to July 3, 1930, there was a finding generally by the jury in favor of the plaintiff and the special interrogatory requested by Government counsel referring to the date July 3, 1931 would have been immaterial as the evidence showed the veteran was insane on and prior to July 3, 1930.

It is, of course, pertinent to look at the evidence showing that the veteran was an insane person not only on July 3, 1930, but continuously insane since August 31, 1920.

Clara Mahoney, wife of the veteran, testified she knew her husband prior to his entry into the service at which time there was nothing wrong with him (R. 31). They were married five days after his discharge while the veteran was still in uniform (R. 31). This suggests that she had no opportunity to really know his condition at that time. Further, the wife testified that her husband was in the same condition at the time of trial as he was when she married him in May, 1920 (R. 34), outside of having seizures. The first seizures she noticed were around 1925 (R. 35).

Appellant's brief (Page 34) comments on the wife's being in a better position than anyone else to know the facts about her husband's condition following his discharge. This is true, but this witness had lived with an insane man from 1920 to the time of trial, except for the times he was confined in hospitals for the insane. She had been through harrowing experiences (R. 173, 178, 194, 286, 372 and 373). The court and the jury had an opportunity to observe this witness and clearly understood the handicaps under which she was testifying and furthermore, believed her testimony.

Government counsel, in his opening statement (R. 399), admitted the insured was permanently and totally disabled around 1934. In Government counsel's closing argument (R. 401) he stated, "He is no doubt permanently and totally disabled now. He no doubt has been for several years, perhaps since 1936."

Therefore, based upon the above admissions and the testimony of the wife that the veteran was the same at the time of trial as he was in 1920 while the policy was in force, is substantial evidence in itself. The jury could have reasonably found on this evidence alone, coupled with the above admissions, that the veteran was insane and permanently and totally disabled prior to the lapse of his policy.

Mrs. Frank Donahue, sister of the veteran, testified that the veteran's health and mental condition prior to his entry into service was very good (R. 38-39). She observed the veteran while home on a fur-

lough after his injury in France and before his discharge from the army, and noticed the following:

> "He was very nervous and quarrelsome and seemed to be afraid of something,— I just don't know what it was—and his mind seemed to be rambling. He would carry on a conversation, he would ramble and never could stay on one thing at a time, subject." (R. 39)

This witness further stated that during this furlough her brother was very nervous, hard to get along with, thought everyone was down on him, conversation wandered, be on one subject and then would discuss something else (R. 42-43). All of these symptoms of mind wandering, being suspicious of other people, etc., were not present before he went into the army (R. 44). In other words, we have here an individual, due to his suffering and stress of army life, who came out with a changed personality.

This witness also testified that at the time of her visit in Portland a few days before trial, she didn't see any change in his condition at this time compared to his condition at the time of the furlough in January, 1920 (R. 42).

This witness, as pointed out in appellant's brief (footnote, Page 10) was confused as to dates. However, her testimony definitely referred to the time of the furlough. When checking the Government records we find the veteran had two furloughs, first a thirty day leave in October, 1919, and again from January

25, 1920 to February 10, 1920 (R. 117). Therefor it appears that she made her observations on either one or the other of these two furloughs.

A. E. Abbott testified that he is the Bookkeeper for Northern States Power Co. in Minneapolis, Minnesota; that he met Mahoney in February, 1921 at the company's plant in Minot, North Dakota (R. 52); that veteran bore the nickname "Dizzy Mahoney"; that while Mahoney was supposed to be working you would usually find him in some out of the way place amusing himself by either looking out the window or playing with some small objects in his hands (R. 54). Further testified, "He was peculiar." (R. 54); that he did not associate with others, he kept to himself (R. 54).

Walter Dooley, statistician for the same company, testified that the veteran while employed by his company didn't do much associating (R. 62-63). On one occasion the manager told Mahoney to lay off of a Mr. Slocum who weighed 250 lbs., Mahoney weighing 130 or 135 lbs., and Mahoney replied he would cut Slocum down to his size (R. 64).

Mahoney thought certain employees disliked him very much and thought they were out to get his job, get rid of him or make life miserable for him (R. 64-65).

J. A. Hennessy, Auditor of stores and garages for this company, testified that he was Chief Clerk at Minot and to a great extent directed Mahoney's work and had charge of his activities. R. 68). This witness

was a World War veteran and active in the American Legion. He testified that the Minot American Legion Post was trying to place those who had been in the service and that was the reason Mahoney was employed (R. 68-69).

He testified that the veteran, as soon as he had done what he was told to do, was hard to find; he would more or less leave the office—not the building. You would have to go and find him and he would be in the basement or on the second floor just sitting and apparently thinking, kind of a blank expression on his face (R. 69). Didn't put him on work requiring accuracy (R. 70). He was pretty much of an "aloner" (R. 70). Observed veteran when he went to find him and would find veteran staring out the window or into space (R. 70). Veteran was difficult to handle. He seemed to take prejudice against certain people (R. 70).

This witness further stated he was a service man himself and then testified (R. 70-71):

> "Q. Would you tell the court and jury if this had anything to do with employing Mr. Mahoney?
>
> A. I think it had a lot to do with my putting him to work and keeping him working. In those days we were very swmpathetic towards each other and tried to help each other and I would say it had considerable to do with both.
>
> Q. Mr. Hennessy, in the absence of sympathy or feeling about being a World War Veteran,

would you now hire a man of the capacity Mr. Mahoney had at the time Mr. Mahoney worked for the company?

A. I would not personally and, of course, our company rules are more stringent than they were in those days, even though my sympathy were with him."

On cross-examination testified that the veteran left his employ with a distinct feeling of relief on the part of this witness (R. 71).

These three witnesses were fellow employees of the veteran. One of them was the man who employed him and who supervised his work. This is the only period of employment of this veteran since discharge from service. He proved to be unsatisfactory because of his mental condition. He was peculiar and was possessed of an unsound mind.

John Mahoney, brother of the veteran, testified that the veteran was normal physically and mentally and was working before he entered the army (R. 74). During the furlough this witness noticed that his brother had changed considerably referring to his mental condition (R. 77). The veteran would sit in the house with a stare on his face. You would have to talk to him several times to get an answer out of him. Didn't associate much with other people (R. 77). Imagined everybody was bothering him—somebody after him. His conversation was very rambling, be talking on one subject and switch over to something else, couldn't make head or tails of it. He would sit

and stare, dream and didn't seem to want to talk to anyone (R. 78). He was very irritable. None of these things were present before he went into the army (R. 79).

Francis Mahoney, brother of the veteran, testified by deposition at the request of the Government and stated that when the veteran got home from the service he was awfully nervous; he was not the same as when he left, his actions, he acted funny, irritable and nervous (R. 84). His conversation was rambling. He would start to say something and say something else (R. 85).

On cross-examination this witness testified that when Mahoney was home on the furlough he was nervous and was kind of funny in that he was suspicious of members of the family and other people (R. 89-90). He talked funny at times. His conversation was different than it was before he went into the army. Noticed an entire change of personality when his brother returned from the army as to what it was before he went into the army (R. 90).

Francis Mahoney next saw his brother in Portland, Oregon, around 1927 and noticed the same condition that he noticed before (R. 91). He visited his brother at the Veterans Hospital at Roseburg, Oregon on two occasions (R. 91). The veteran's first admission to the Veterans Hospital, Roseburg, Oregon, was on January 19, 1938 (R. 216). Findings of the Government doctors were: psychosis, epileptic, deterioration, as well as physical disabilities, and under "re-

marks" stated Mahoney was considered by the staff to be mentally incompetent and his disability to be permanent and total (R. 223). Francis Mahoney testified that his brother was about the same when he saw him at the Roseburg Hospital where the Government doctors found Mahoney insane as the veteran was at the time of his discharge (R. 92). It was this witness's opinion that his brother was queer when he came home and his actions were different but did not hold himself out as an expert in determining whether a man is insane or sane (R. 92).

James Mahoney, another brother of the veteran, testified by deposition at the request of the Government, that when the veteran came home from the army he was irritable and felt he was getting the worst of things, never took any interest in any one particular thing, didn't associate with friends, felt people were against him, when talking would skip from one subject to another, there was a change in his personality (R. 94-95), none of these things were true before he went into the army. Prior to his service he was normal mentally (R. 95). This witness noticed the same changed condition in his brother when he saw him in Portland in 1923 (R. 95). Also in 1927 (R. 96) noticed that his brother's conversation was rambling.

> "I mean that he would not talk on one subject. He would ask a question. Perhaps before you would answer the question, he would ask you another one on something else" (R. 321).

Testified further that his brother always seemed to be practically the same (R. 322).

This witness next saw his brother in 1923 and stated his condition was practically the same as it was in 1920 (R. 323). Again saw him in 1927 and the condition was again still the same (R. 323).

Dr. John Evans, Superintendent of the Oregon State Hospital for the Insane, testified he first examined the veteran on March 10, 1934, found him suffering from epilepsy with deterioration (R. 236) and was insane, mentally sick at that time (R. 238). A hypothetical question based on evidence produced at the trial was asked this witness (R. 240-242) and the doctor stated that at the time of Mahoney's discharge from the army in 1920 it was his opinion that there certainly was something radically wrong with Mahoney's mind; that there would have to have been something wrong (R. 244). That in his opinion Mahoney's entire trouble was the result of the head injury or injury to the central nervous system he received on November 11, 1918 (R. 244). If this injury had not occurred he would not have had epilepsy (R. 244). His impaired state of mind must have started perhaps within a few months following the head injury. Couldn't say whether it was the first two weeks or the first two months or a year but believe it was during that period (R. 245). This would bring his impaired state of mind long before his policy lapsed in August 1920. In his opinion the mental symptoms started prior to 1920 (R. 246). That the veteran was deteriorated

for some considerable period prior to this doctor's examination (March 10, 1934), that the veteran's brain was injured which is much more harmful and much more permanent than some of the functional conditions known as being psychotic or insane (R. 247). This is a type of mental illness (R. 247). The best way to tell when this man became insane would be from the persons who associated with him and saw these changes of personality (R. 248). Further testified that the veteran's condition was permanent (R. 251). On cross-examination testified that the symptoms given in the hypothetical question were sufficient on which to base a diagnosis of mental deterioration (R. 256).

Dr. Knox Finley testified he examined the veteran shortly prior to trial and found him a very dull individual (R. 265) and performed an electroencephalogram that showed the veteran's brain was not functioning normally (R. 266) and in his opinion Mahoney was of unsound mind at the present time (R. 266). That there is no cure for this condition (R. 266); that his judgment would be impaired, be a lack of acute thinking, also memory was partially impaired, judgment defective (R. 266). Upon being asked a hypothetical question based on the evidence, this expert said that in his opinion the veteran in January, 1920 when he came home on a furlough was mentally ill; that the illness the doctor found on examining the man shortly before the trial was in existence at that time and Mahoney was of unsound mind in January, 1920

(R. 269). By unsound mind this witness meant an alteration either in a man's judgment, behavior, memory, or emotional reactions, one part or all of these things (R. 275). That the term insanity is not used in medicine. If you mean by insanity, alteration in the personality in the way of judgment, emotional reaction, behavior, memory, then it is synonymous with unsound mind (R. 276). In this witness's opinion veteran was psychotic in 1929 or 1930 (R. 277).

Dr. F. J. Ernest, a Veterans Bureau doctor, testified for the Government that when he examined the veteran on October 24, 1932, he found no evidence of any abnormality (R. 380). He again examined the veteran on November 4, 1937 and diagnosed the veteran as suffering from psychosis, with epileptic deterioration (R. 383). This witness also examined the veteran on October 10, 1935 and made this diagnosis: epilepsy grand and petit mal with psychotic episodes. Psychotic at this time (R. 184).

It is interesting to compare the neurologic examination (R. 164) made by Dr. Ernest on October 24, 1932, when he was unable to find any abnormality, with the neurological examination made at American Lake on October 11, 1935 (R. 187), when the doctors found the veteran to be incompetent, socially and economically inadaptable and requiring hospitalization (R. 195) with a diagnosis of psychosis, epileptic deterioration (R. 195), there not being any differences in the neurological findings at all. Unfortunately this witness, though experienced in his field, failed to realize the

patient's condition when he first saw him and it wasn't until he saw the patient the second time he realized he was psychotic. This is not meant as a criticism of the doctor's ability, but this very thing often happens. If the doctor had known this patient before the war and then observed the marked change of personality, he probably would not have made this mistake.

On cross-examination this witness admitted he based his diagnosis of mental incompetency the second time he saw the patient, in that Mahoney's conversation was rambling (R. 387-388). It should be noted the evidence showed Mahoney was in this condition ever since his furlough in 1920. This witness in answer to a hypothetical question (R. 389-390) admitted that Mahoney's symptoms were evidences of abnormality and if present continuously it would be evidence of mental deterioration, of change (R. 390). Evidence of an unsound mind (R. 391). Also admitted that it was usually the members of the family that noticed these changes and then the individual is finally brought to the psychiatrist because of his abnormality (R. 391).

In addition to the oral testimony there was documentary evidence.

Exhibit 12 showed veteran's condition at discharge to be poor (R. 100).

Exhibit 4 showed veteran became unfit for duty from present disease or injury November 11, 1918. Also showed an eighty per cent disability at time of discharge from army service (R. 102-103). Veteran

injured by being hit on the head by three sacks of potatoes at Langres, France on November 11, 1918 (R. 111). Disability 80% (R. 112).

Exhibit 4 also included the clinical record pertaining to the treatment of this veteran (R. 114-129) which stated:

History of present disease, November 11, 1918, three sacks of potatoes fell and hit him on head and shoulders and jack-knifed him (R. 114). Lamenctomy at Langres, France, November 11, 1918 (R. 115). October 25, an absolutely helpless patient when down. Can't rise, nor dress, nor wrap leggings (R. 116). October 27th, walks like ghost or slips about like a mummy on skids (R. 117). March 28, 1920—Patient is extremely nervous and borders on hysteria (R. 119). This same record shows that the veteran was continuously hospitalized from November 11, 1918 until his discharge with an eighty per cent disability on May 22, 1920 (R. 98-129).

Exhibit 1. The first examination by Government doctors following discharge on April 9, 1921, under No. 10 was the finding "Unable to work." (R. 135). The next examination was on May 5, 1921, but record states did not examine the man, merely took data from the file (R. 137).

Exhibit No. 1. The first Neuro-psychiatric examination of this man was made on October 24, 1932, as part of an examination for compensation purposes (R. 160) (R. 163-166). This N. P. examination was by Dr. Ernest who testified at the trial. The record of the

examination is concluded with the statement: "Diagnosis:—Undiagnosed. (Alleged seizures.)" (R. 166). This does not seem to square with this witness's testimony he could find nothing wrong. If nothing had been wrong his diagnosis would have so stated.

Next N. P. examination was on May 10, 1934 (R. 169-179) and given diagnosis of epilepsy with deterioration (R. 179). Under summary the staff of doctors at American Lake Hospital stated: "It is quite evident from the history of this case that his difficulties started, possibly, during the war, when he received a severe injury to his back.—The wife states that approximately ten or twelve years ago she noticed a decided change in his personality" (R. 178).

Examination of October 10, 1935 by Dr. Ernest, in which he found the veteran psychotic and suffering from epilepsy (R. 184). At this time the doctor who testified for the Government was able to diagnose the case. In the N. P. examination at American Lake, October 29, 1935, the Government doctors found: psychosis, epileptic deterioration and it was their opinion that the patient was incompetent (R. 195). In this same examination, the Government doctors commented that Mahoney had vocational training in 1922 but was never able to take the proper advantage of this training and further that veteran did not make a very good economic adjustment at any time (R. 193).

Examination at the same insane hospital of the Government on April 15, 1936, showed the same psychotic condition. Also the statement that there is a

history of moderate amount of alcoholism which apparently bears no relation to seizures (R. 202). This is pointed out merely because the Government attempted to inject alcoholism into this trial as being the cause of the veteran's disability and here the Government's own doctors when not in court, definitely state this is not true.

The remaining government examinations are essentially the same except it might be pointed at the first examination at the Government's hospital for mental cases in Roseburg, Oregon, on February 18, 1938 (R. 224) the doctors stated that the veteran was mentally incompetent and his disability permanent and total (R. 223). It should be remembered some of the lay witnesses saw the veteran at this hospital and stated his condition was the same then as it was at the time of his discharge.

This veteran was committed by a Court of the State of Oregon upon a finding that he was insane on March 9, 1934 (R. 289-291).

What is the meaning of the word "insane" as used in the statute (38 U.S.C. 445). The following authorities have passed on this point:
Webster's International Dictionary, Second Edition, Unabridged

Defines "insane" as:

> "Unsound, exhibiting unsoundness or disorder of mind."

Defines "insanity" as:

"Unsoundness or derangement of mind. Insanity is rather a social and legal than a medical term, and implies mental disorder resulting in ability to manage one's affairs and perform one's social duties. The nature and degree of insanity required to affect a person's civil capacity varies with the nature of the case, the general test being as to whether with respect to the matter in hand, the person can act rationally, understanding the nature of his act and natural consequences of it in affecting his rights, obligations and liabilities."

Black's Law Dictionary, Third Edition
Page 972:

"Insane. Unsound in mind; of unsound mind; deranged, disordered, or diseased in mind. Violently deranged; mad."

"Insanity. Unsoundness of mind; madness; mental alienation or derangement; a morbid psychic condition resulting from disorder of the brain, whether arising from malformation or defective organization or morbid processes affecting the brain primarily or diseased states of the general system implicating it secondarily, which involves the intellect, the emotions, the will, and the moral sense, or some of these faculties, and which is characterized especially by their non-development, derangement, or perversion, and

is manifested, in most forms, by delusions, incapacity to reason or to judge, or by uncontrollable impulses. In law, such a want of reason, memory, and intelligence as prevents a man from comprehending the nature and consequences of his acts or from distinguishing between right and wrong conduct."

"* * * 'Insanity in law covers nothing more than the relation of the person and the particular act which is the subject of judicial investigation. The legal problem must resolve itself into the inquiry, whether there was mental capacity and moral freedom to do or abstain from doing the particular act.' 1 Whitth. & Beck. Med. Jur. 181; U. S. v. Faulkner, 35 F. 730."

"* * * By insanity is not meant (in law) a total deprivation of reason, but only an inability, from defect of perception, memory, and judgment, to do the act in question, (with an intelligent apprehension of its nature and consequences) * * *."

Page 1786:

"Unsound mind. A person of unsound mind is one who from infirmity of mind is incapable of managing himself or his affairs."

Page 981:

"To constitute insanity such as will authorize the appointment of a guardian for the patient, there must be such a deprivation of reason and judg-

ment as to render him incapable of understanding and acting with discretion in the ordinary affairs of life; a want of sufficient mental capacity to transact ordinary business and to take care of and manage his property and affairs. See Snyder v. Snyder, 124 Ill. 60; 31 N.E. 303; In re: Wetmore Guardianship, 6 Wash. 271; 33 P. 615."

"Insanity as a plea or proceeding to avoid the effect of the Statute of Limitations means practically the same thing as in relation to the appointment of a guardian. On the one hand, it does not require a total deprivation of reason or absence of understanding. On the other hand, it does not include mere weakness of mind short of imbecility. It means such a degree of derangement as renders the subject incapable of understanding the nature of the particular affair and his rights and remedies in regard to it and incapable of taking discreet and intelligent action. See Burnham v. Mitchell, 34 Wis. 134."

Law Dictionary With Pronunciations by Ballentine Defines "insane" as follows:

"Unsound in mind or intellect; mad; deranged in mind; delirious; distracted."

Defines "insanity" as follows:

"A diseased or disordered condition or malformation of the physical organs through which the mind receives impressions or manifests its

operations, by which the will and judgment are impaired and the conduct rendered irrational. 14 R.C.L. 550."

Dorland, The American Illustrated Medical Dictionary, 15th Edition

Defines "insane" as follows:

"Affected with insanity; not of sound mind."

Schouler on Wills, 1889—Section 100

"Insanity, to define that word, settles, as we have already indicated, in the opinion of the best medical men, into a comparison of the individual with himself and not with others; that is to say, some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is either inexplicable or best explained by reference to some shock, moral or physical or to a process of slow decay, which shows that his mind is becoming diseased and disordered."

Connecticut Mutual Life Insurance Co. v. Lathrop, 111 U.S. 612, 619:

"Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowl-

edge, according to their mental capacity and habits of observation * * *."

Oklahoma Natural Gas Corp. v. Lay
175 Okl. 75; 51 P. (2d) 580, 582 (1935)

"The word 'insane' ordinarily implies every degree of unsoundness of the mind or of mental derangement, from temporary nervous excitement to acute insanity, and therefore includes the extreme case of an entire want of understanding. 32 C.J. 613, Paragraph 82."

"Unsoundness of mind has been judicially declared to be synonymous with insanity. It exists where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life. 32 C. J. 621, paragraph 71."

Buchanan v. Wilson
97 Neb. 369; 149 N.W. 802, 806 (1914)

"Insanity is a mental symptom or manifestation of physical disease which impairs the understanding so that one or more faculties of the mind is perverted, weakened, or destroyed."

Cundell v. Haswell
23 R.I. 508; 51 A. 426, 428 (1902)

"The primary definition of insanity, according to the Century Dictionary, is 'unsoundness of mind'. And that a person who is incapable of

continuous or connected thought is unsound in mind would seem to be so self-evident and so manifestly true as to render argument thereon superfluous."

Fendler v. Ray
331 Mo. 1083; 58 S.W. (2d) 459, 464 (1932)

"Unsoundness of mind has been judicially declared to be synonymous with insanity."

Knapp v. St. Louis Trust Co.
199 Mo. 640; 98 S.W. 70, 78 (1906)

"A marked change in a person's habits and thoughts is evidence of mental unsoundness. Insanity is indicated by proof of acts, declarations and conduct inconsistent with the character and previous habits of the person."

Beattie v. Bower
290 Mich. 517; 287 N.W. 900, 903 (1939)

"Insanity is a broad, comprehensive and generic term of ambiguous import, for all unsound and deranged conditions of the mind. It includes every species of organic mental derangement, whatever may be its source or cause, whether the mental condition is congenital, or the result of arrested mental development, or of the act of Providence, or of the party's own imprudence, or of religious excitement, or of physical disease, or of dissipation, or of old age, or of unknown causes, or whether it is personal or hereditary."

In Application of Jordan
10 N.Y.S. (2d) 911 (1939)

> The court held that the word "insane" or "insanity" ordinarily implies every degree of unsoundness of mind and that degrees of insanity are recognized in jurisprudence.

In State v. Lyons
113 La. 959; 37 So. 890 (1904)

> The Supreme Court of Louisiana held that insanity is a disease or abnormal condition which manifests itself in eccentricities of conduct, speech, or appearance; that is to say, in the doing and saying of things which attract attention because, judged by the common standard, they are deviations from that which is regular and usual.

The trial judge very carefully and thoroughly defined the meaning of the word "insane". The court's definition and interpretation of the words "insane" and "insanity" followed the above quoted authorities (R. 406-408). There was an abundance of evidence in this record showing that the veteran was possessed of an unsound mind at the time of his discharge from the army. Further, there was an abundance of evidence showing that the veteran had mental symptoms and a mental disease which impaired his understanding. The veteran's mental condition was such as to induce a deviation from his normal conduct compared to the way he acted before he was afflicted with this mental

disease. As stated in Black's Law Dictionary, supra, insanity is a manifestation of disease of the brain. All of the evidence in the present case shows that this veteran had a disease of the brain shortly following his injury in France. This veteran from the time of his discharge did not possess sufficient judgment to render him capable of understanding and acting with discretion in the ordinary affairs of life. This veteran certainly, due to his disordered mind, did not know of the necessity of filing such an action as the present case in order to recover the benefits due him on his policy of war risk insurance. It was not until a guardian was appointed that it was possible to protect the rights of this incompetent veteran. The primary definition of "insanity" is unsoundness of mind, and unsoundness of mind has been interpreted by the courts to be synonymous with insanity. Dr. Finley testified that in his opinion, based upon his examination of the veteran shortly prior to trial, together with the symptoms noticed by the veteran's family and friends at the time of the furlough in January of 1920, and the symptoms that continued right on up to the present time, that Mahoney was of unsound mind in January of 1920. In other words, he was insane in January of 1920, under the legal definition of insanity, as Dr. Evans said there was something radically wrong with Mahoney's mind at the time of his discharge from the army (R. 244-245).

A marked change in a person's habits and thoughts is evidence of mental unsoundness. Insanity is indicated and proved by a showing of acts, declarations

and conduct inconsistent with the character and previous habits of the person. In the present case there was a great quantity of evidence showing the type of individual the veteran was prior to his service and the marked change in personality when the Veteran returned home on his furlough in January, 1920. This marked change continued on down to the present time. For example, the rambling speech, the disconnected thoughts, being suspicious of his family and fellow employees, highly nervous, being afraid of something; being known as "Dizzy Mahoney", staring out into space, fumbling with small objects in his hands while supposedly working, being noted as being peculiar, blank expression on his face, being by himself—not wishing to associate with others and acting funny. This was an entirely different man from the Mahoney who enlisted in the United States Army in 1917. Prior to his service he was a typical young Irish man of a small community, sociable in nature, liking to go to dances and mixing with his fellow men, steadily employed and making his own way in the world. While in the army he suffered a severe blow to his head and back and was continuously hospitalized from November 11, 1918 until his discharge in May of 1920. Here we have the cause of this man's mental breakdown while in service. This is what the Government doctors say was probably the start of his mental condition; here is what Dr. Evans, Superintendent of the Oregon Hospital for the insane, states is the cause of his mental condition. When he returned home the family noted the changed man. There was not only substantial

evidence but a vast preponderance of evidence showing that Mahoney prior to the lapse of his policy had become insane within the meaning of the term.

The appellant refers in its brief to the case of Galloway v. United States, 130 F. (2d) 467 (C.C.A. 9) Affirmed. . . . U. S. . . ., 63 S. Ct. 1077. In this case the trial court directed a verdict for the defendant and this court affirmed the trial court. The evidence in the Galloway case is considerably weaker than the present case. In the first place, the lay witnesses were very indefinite. For instance, the witness O'Neill stated that he could not recall whether he saw the veteran once or a thousand times and the other testimony was of a like character. Furthermore, it was developed by the Government in its evidence that the veteran was in the service during subsequent enlistments during the period of time that the lay witnesses were presumed to have seen and observed the veteran's condition. Nevertheless, the Supreme Court of the United States, in the opinion of Justice Rutledge, held that the chaplain's testimony gave strong evidence that the man he observed was insane. However, there was a fatal weakness in the chaplain's evidence when the chaplain admitted that he might have been mistaken as to the time of his observance of the veteran. In other words, if the chaplain's testimony had been clearly identified, the Supreme Court of the United States would have held it to have been an error to have directed a verdict for the Government. Of course, this case had other weaknesses in that the veteran had two

enlistments subsequent to the lapse of his policy and as this court stated, these two enlistments were such physical facts as to refute any reasonable inference that might be drawn from the evidence that the veteran was totally and permanently disabled during the life of his policy.

In view of the Supreme Court's holding that if the chaplain's testimony had been clearly identified it would have been strong evidence that the veteran was insane, it is interesting to look at the testimony of the chaplain. This testimony appears on pages 72-78 in the record of the Galloway case on file in this Court. All the chaplain's testimony really amounted to was that he noticed that the veteran was mentally deranged because of the fact that he would usually find him abnormally depressed and the veteran would excitedly launch into a discussion of what to his understanding was discrimination on the part of the military authorities. Further, the veteran seemed to have no interest and showed no interest in army life in general and manifested no interest in anything outside of his own claim; that it was extremely difficult to divert the soldier from his claim, in that he could not apparently concentrate on any other subject which the chaplain would introduce for discussion. The chaplain stated that he noticed a mental breakdown because of the abnormality and uncalled for excitement and the feeling that the veteran had of being mistreated. That the veteran appeared to be in a state of depression and his general appearance was that of

mental exhaustion and this witness considered the veteran to be irrational.

Now the above was the sum and extent of the chaplain's testimony which the Supreme Court of the United States held was strong evidence of the veteran being insane. In our present case we have many more symptoms and much stronger symptoms of insanity right from the time the veteran first came home on his furlough in 1920.

The facts in the present case are much stronger than the facts were in the case of Halliday v. United States (315 U.S. 94). In that case the trial court denied the Government's motion for a directed verdict and the jury returned a verdict for the veteran. The Appellate Court reversed the trial court and the Supreme Court of the United States reversed the decision of the Circuit Court of Appeals. The Supreme Court commented on the fact that one brother testified that the veteran's condition upon his return was practically the same as it is today.

Under such a record it was clearly a question for jury to pass upon as to whether or not the veteran was insane on or prior to the critical date.

In Berry v. United States (312 U.S. 450) the facts of the case were that the veteran received an injury while in France. The Government gave the veteran vocational training and the veteran worked for a substantial period of time following his vocational training and the court held that taking the evidence as a whole, the jurors who heard the witnesses and

personally examined the petitioner's wounds could fairly have reached the conclusions that since his injuries the veteran never had been able, and would not be able thereafter, to work with any reasonable degree of regularity at any substantially gainful employment. The Supreme Court also ruled that the trial judge, who had the same opportunity as the jury to hear the witnesses, denied the Government's motion for a directed verdict and correctly instructed the jury what they must find from the evidence in order to return a verdict for petitioner. In other words, the later decisions of the Supreme Court of the United States, as well as those of the Circuit Court of Appeals, are to the effect that war risk insurance cases are usually factual matters and ordinarily should be submitted to a jury to determine the factual matters.

In conclusion, we submit that there was an abundance of substantial evidence showing that this veteran was not only insane on July 3, 1930 but had been insane since at least August 31, 1920 and while his policy was in force and effect. The interpretation of the word "insane" as used in the statute is amply explained in the above quoted authorities. Certainly within the meaning expressed in these authorities, this veteran was insane. Further, the jury was carefully and thoroughly instructed on the meaning of the word "insane" and at the Government's request were given a special interrogatory on this question. The able attorneys representing the Government took no exception to any of these instructions.

The trial court clearly did not err when it overruled the Government's motion to dismiss this case for lack of jurisdiction.

III.

There was subtsantial evidence showing that William V. Mahoney was totally and permanently disabled on or prior to August 31, 1920.

Much of the substantial evidence which sustains appellee's contention is reviewed in our argument under Point II. We reiterate the same by reference here rather than to repeat this testimony. This in itself constitutes a conclusive answer to appellant's contention on this point.

As the veteran was insane since January, 1920 and the doctors all admitted this type of mental disease due to trauma, a head injury, is incurable, the veteran's insanity was permanent. The subsequent facts, even without the doctor's testimony proves this. He had the disability at discharge, still has it and the Government admits the veteran is totally and permanently disabled now.

But in addition to having a veteran that was mentally disabled while his war risk policy was in force, in this case, we have a veteran who received a severe physical disability on November 11, 1918 for which he was continuously hospitalized up to the time of his discharge on May 22, 1920 for over eighteen months.

At times during this eighteen months the army doctors found the veteran to be an absolute helpless patient when down (R. 116); walks like ghost or slips about like a mummy on skids (R. 117); is extremely nervous and borders on hysteria (R. 119). The veteran was given a certificate of disability for discharge (R. 102) and was found to be eighty per cent disabled (R. 103).

Counsel for the Government, in his opening statement, said: (R. 399)

> "The Government admits without any hesitation that Mr. Mahoney has a permanent disability and has had a permanent disability of severity since the day of this discharge from the army * *."

The Government offered evidence of one period of work performed by Mahoney following his discharge from the army. This evidence was by the witness McGrath (R. 295). It was taken by deposition and counsel for the plaintiff was not present to cross-examine this witness. McGrath did not know the veteran and only read into the record what the Northern States Power Co. records showed, that is, employment from July, 1920 to December, 1921 (R. 296-302). The veteran was given this job of office boy, although a grown man, because of the activity of the American Legion and the sympathy of J. A. Hennessy (R. 71). The jury could have well drawn the inference from Hennessy's testimony that the veteran was away from his work and a definite notation of absences might not appear in the company's records.

But regardless of this, it was for the jury to determine whether or not Mahoney was able to follow a substantially gainful occupation continuously. This means was he physically and mentally able to work to the satisfaction of a reasonable employer. Employment given the man because of sympathy does not defeat his right to recover. Furthermore, it was necessary to constantly direct this veteran and employment under constant direction will not refute total and permanent disability. Asher v. United States, 63 F. (2d) 20, (C. C.A. 8) and United States v. Newcomer, 78 F. (2d) 50 (C.C.A. 8).

It is obvious from this record that a man with a physical disability such as Mahoney had, could not perform labor. The only thing that remained would be clerical work, something involving the use of intelligence. In his opening statement, Mr. Dillon, of counsel for the Government, said:

> "* * * It is admitted and is common sense, which you will gather very quickly, that at no time of course could Mr. Mahoney do physical labor of any heavy degree. His activities were of necessity confined to what we call sedentary, light, or office work, * * *." (R. 399)

The Government recognized this and gave the veteran vocational training, tried to make a bookkeeper out of him. Government doctors in commenting on this in October, 1935, said:

> "He had vocational training in 1922 but was never able to take the proper advantage of this training." (R. 193).

This means, and it is so evident from the record, that Mahoney had at the time of his discharge a severe permanent physical disability. On top of that he had a severe permanent mental disability and the combination prevented him from doing physical labor and also from working at any job that required the use of mental processes. There was no work that he could do to the satisfaction of a reasonable employer. Therefore, the trial judge was right in overruling the Government's motion for a directed verdict.

The attorneys who wrote appellant's brief comment on plaintiff's alleged failure to offer proof of plaintiff's ward's activities subsequent to the year 1922 (page 34). We cannot believe that the Government lawyers who tried this case would have urged any such proposition had this brief been entrusted to their care, since it was admitted at the trial that:

> "As a matter of fact Mr. Mahoney has done practically no work since his graduation from vocational training." (R. 399)

Admittedly there was but one period of employment since the war. This was proved and covered by numerous witnesses for both sides. Then came vocational training with the results shown in the Government doctor's report (R. 193) from which we quote:

> "He had vocational training in 1922 but was never able to take the proper advantage of this training."

To cover the period from vocational training to confinement in the Oregon State Hospital for the Insane, we presented testimony from the veteran's family showing that no work was done by veteran to their knowledge and that his condition continued as previously described. The written records, i. e., Government medical reports, were introduced.

It was manifestly impossible to put plaintiff's ward on the stand; his wife was presented, examined and questioned as far as counsel felt her condition would permit, then she was submitted to cross-examination. It is significant that this cross-examination was very brief and contained no questions about Mahoney's activities beyond those mentioned above. The court and jury saw Mrs. Mahoney and gauged her veracity and mental and physical condition. It is urged that plaintiff offered, under these circumstances, all that could be produced.

Plaintiff's case involves a man who sustained a broken back and a serious head injury while in service. Appellant's counsel concede that his injuries were serious and permanent. Army doctors at discharge found he was eighty per cent disabled. Sympathy and American Legion activity secured the only job he ever had after service. Government's attempt to rehabilitate him through vocational training was a failure. Since November 11, 1918, he has been physically and men-

tally sick and a proper subject for medical and hospital care. Under this record we have a jury question as to whether or not his policy of war risk insurance matured by reason of being permanently and totally disabled at the time of his discharge from the army.

We believe we are sustained in this view by the reasoning found in Hoisington v. United States, 127 F. (2d) 476 (C.C.A. 2) from which we quote:

> "Whether the plaintiff was totally and permanently disabled before the lapse of his policy is essentially a question of fact to be determined by the jury, and a proper regard for the fundamental right of trial by jury requires an appellate court to support the jury's verdict unless it is entirely clear that the evidence fails to sustain it. In the case at bar there was not only testimony of laymen, including the plaintiff himself, but also medical evidence from which the jury could find that from the date of his discharge from the army he was suffering from a nervous, neurasthenic condition. * * * His disability has been progressive and continuous. That it satisfies the definition of 'permanent' is not seriously questioned, and could not be. See Lumbra v. United States, 290 U.S. 551, 560, 54 S. Ct. 272, 78 L. Ed. 492. Whether his disability satisfies the definition of 'total' is not so clear. That occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability may not be doubted. Berry

v. United States, 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945; Lumbra v. United States, 290 U.S. 551, 561, 54 S. Ct. 272, 78 L. Ed. 492. But in the case at bar it appears that the plaintiff worked from January 10, 1925, to May 15, 1936, a total of 36 two-week periods. In 25 of these he worked full time (12 days), in 4 he lost but one day, and in the remaining 7 he lost a total of less than one-third of full time. After a five month lay-off in the summer of 1936, the reason for which does not appear, he was reemployed at increased wages and worked consecutively for 22 two-week periods, in more than half of which he worked full time and in none of which did he lose more than two days. Such extended periods of continuous labor after the critical date tend to support the appellant's contention that as a matter of law the insured was not totally disabled before May 31, 1919. Some years ago this court would quite likely have so ruled. In United States v. McDevitt, 2 Cir., 90 F. (2d) 592, at page 595, we said that 'A man who can hold jobs for ten and sixteen months at a stretch, is not 'totally disabled,' even though he must give up for a season and seek work anew.' But recent decisions of the Supreme Court indicate very clearly that the issue of total permanent disability should be left for decision by the jury under proper instructions, rather than determined by the judges. Berry v. United States, 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945; Halliday v. United States, Jan. 19, 1942, 315 U.S. 94, 62 S. Ct. 438,

86 L. Ed. . . . ; see also Jacobs v. City of New York, March 30, 1942, 314 U.S. . . ., 62 S. Ct. 854, 86 L. Ed. . . . . In the Berry case a decision adverse to the veteran was reversed because the evidence as a whole would justify the jury in finding that since his injuries he never had been, and would not thereafter be, able 'to work with any reasonable degree of regularity at any substantially gainful employment.' The Halliday case, where the disability resulted from impairment of mind, as in the case at bar, is to similar effect. In the light of these recent authoritative opinions we find no error in submitting the case at bar to the jury and allowing its verdict to stand * * *."

CONCLUSION

It is respectfully submitted that this appeal should be dismissed because of appellant's refusal and failure to include in the record on appeal, all of the evidence produced at the trial of this case.

In the event that this Court does not dismiss this appeal, it is respectfully submitted that there was substantial evidence showing that William V. Mahoney was an insane person prior to July 3, 1931 and further, was permanently and totally disabled on and prior to August 31, 1920 and that, accordingly, the judgment should be affirmed.

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October, 1943.